A

PP

v.

YEE CHEONG SENG

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CRIMINAL TRIAL NOS: (MT-1) 45-65-2005 &
(MT-1) 45-66-2005]
4 MAY 2009

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 39B(1)(a), 39B(2) - Trafficking in dangerous drugs - Ingredients of offence - Possession, nature of - Knowledge, how established - Dangerous Drugs Act 1952, s. 39B(1)(a)*

D

On 9 March 2005, acting on information received concerning drug trafficking activities, a police raiding party kept a hotel under surveillance. At about 1am on 10 March 2005, the police party spotted the accused driving up to and parking his car in front of the hotel. The accused was then observed going into the hotel

E

carrying a sling bag and checking into the hotel. At about 7am, the accused was spotted exiting the hotel and walking towards his car. He was arrested as soon as he got into his car. A search of the car led to the discovery of a newspaper wrapped package under the steering dashboard, containing syabu – a dangerous drug. From the

F

accused, a hotel room key was recovered. When the police party entered the room using the said key, they found a sling bag on the bed. Inside the bag, plastic packages containing syabu were seized. The accused was tried in the High Court on two charges. The first was for drug possession under s. 12(2) of the Dangerous Drugs Act 1952, punishable under s. 39A(1) of the same Act. The second

G

charge was for drug trafficking under s. 39B(1)(a) punishable under s. 39B(2) of the Act.

Held (convicting the accused on both charges):

H

(1) In a charge under s. 39B(1)(a) of the Act to which s. 2 also applied, the onus is upon the prosecution to prove: (i) that the accused had possession of the dangerous drugs in question; and (ii) that the accused did traffic in the dangerous drugs in question. In proving the said ingredients the prosecution may invoke the presumption of possession under s. 37(d) of the Act

I

or the presumption of trafficking under s. 37(da) of the Act. If the prosecution elects not to invoke the presumption of possession under s. 37(d), then it has to adduce evidence to

establish that the accused had possession of the dangerous drugs, independent of the statutory presumption. If, on the other hand, the prosecution elects not to invoke the presumption of trafficking under s. 37(da) then the prosecution has to adduce evidence to show that the accused was trafficking in the dangerous drugs within the meaning under s. 2 of the Act. (paras 12-13)

(2) What constitutes possession is a question of law. Mere custody and control is insufficient to establish possession for the purpose of the Act. Knowledge of such drug by the accused must be established. Knowledge cannot be proved by direct evidence. It can only be inferred from the surrounding circumstances. It is for the court to draw an inference from all the facts and circumstances of the case, giving due weight to the credibility of the witnesses. (paras 14, 18 & 24)

(3) At the end of the prosecution's case, the court is duty bound to consider whether the prosecution has made out a *prima facie* case against the accused. The court must thus undertake a maximum evaluation of the prosecution evidence. In the instant case, the amount of the dangerous drugs involved was almost 4 times the amount necessary to raise the presumption of trafficking under s. 37(da) of the Act. The necessary implication was that the drugs were not for personal consumption. In view of s. 37(da) DDA, the accused was to be presumed until the contrary was proved, to be trafficking in the said dangerous drugs. The prosecution had made out a *prima facie* case of actual possession against the accused. The accused ought to be called to enter on his defence. *PP v. Mohd Radzi Abu Bakar* (foll). (paras 19, 23 & 27)

(4) The burden of rebutting the presumption under s. 37(d) of the Act was on the accused. This evidential burden on the accused to rebut the statutory presumption on a balance of probabilities was heavier than the burden of casting a reasonable doubt but lighter than the prosecution's burden to prove the case beyond reasonable doubt. In the instant case, the accused had not raised any reasonable doubt on the prosecution's case. The accused had also failed on a balance of probabilities to rebut the presumption of trafficking under s. 37(da) of the Act. Thus, the prosecution had proven its case against the accused beyond reasonable doubt for the offences with which he was charged. The accused was thereby found guilty as charged. (paras 33-39)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chua Beow Huat v. PP [1968] 1 LNS 24 HC ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Iskandar Mohamad Yusof [2006] 6 CLJ 379 HC ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC ***(refd)***
PP v. Lee Ah Ha [1988] 1 LNS 193 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(foll)***
PP v. Morgan Ayavoo [2004] 3 CLJ 623 HC ***(refd)***
PP v. Nur Hassan Salip Hashim & Anor [1993] 2 CLJ 551 HC ***(refd)***
PP v. Sim Keng Tee [2008] 9 CLJ 755 HC ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
PP v. Tukiman Demin [2008] 8 CLJ 856 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Yee Ya Mang v. PP [1971] 1 LNS 156 HC ***(refd)***

Legislation referred to:
Arms Act 1960, s. 9(1)(a)
Criminal Procedure Code, ss. 112, 180
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da), 39A(1), 39B(1)(a), (2)
Evidence Act 1950, s. 32
Prevention of Corruption Act 1961, s. 14

For the accused - MA Kadir (KL Chee with him); M/s KL Chee & Co
For the prosecution - Idham (Jean Sharmila & Azreen with him) DPP; State Legal Advisor, Johor Bahru

Reported by Andrew Christopher Simon

JUDGMENT

Vernon Ong Lam Kit JC:

[1] The accused was charged with two offences, the first charge of possession of dangerous drugs under s. 12(2) of the Dangerous Drugs Act 1952 ('DDA') and the second charge of trafficking in dangerous drugs under s. 39B(1)(a) DDA. The charges are as follows:

1st charge

Bahawa kamu pada 10 Mac 2005 jam lebih kurang 7:30 pagi, di bilik no. 201, Sunday Hotel, No. 15 & 17, Jalan Bakawali 48, Taman Johor Jaya, di dalam daerah Johor Bahru dalam negeri Johor Darul Ta'zim, telah didapati memiliki dadah berbahaya iaitu 6.58 gram Methamphetamine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh di hukum di bawah seksyen 39A(1) Akta yang sama.

2nd charge

Bahawa kamu pada 10 Mac 2005 jam lebih kurang 7.00 pagi bertempat di hadapan Sunday Hotel, Jalan Bakawali 48, Taman Johor Jaya, di daerah Johor Bahru dalam negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu 191.65 gram Methamphetamine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Prosecution's Case

[2] On 9 March 2005 at about 12 midnight Insp Norhisham bin Mustapar (PW3) received information about drug trafficking activities by a Chinese man at Jalan Bakawali 48, Taman Johor Jaya, Johor Bahru near Sunday Hotel using a Proton Waja registration number WJA 9290. At 12.30am PW3 who was with ASP Abdullah bin Mohamad (PW2) arrived at Sunday Hotel to carry out a surveillance. At about 1am on 10 March 2005 they saw a Proton Waja registration no. WJA 9290 stopped and parked in front of Sunday Hotel. A Chinese man in a dark shirt alighted from the car. The Chinese man was seen carrying a sling bag and he went into Sunday Hotel. Meanwhile, PW3 and PW2 continued their surveillance and PW3 called for backup. The backup team of six police personnel arrived at about 2am. PW2 then left for Permas Jaya. PW3 organised the raiding party into two teams. The first team was led by PW3. Both teams conducted a surveillance of the subject car and the entrance of Sunday Hotel. The teams were to block the subject car from leaving Sunday Hotel. PW3 and his police party continued their surveillance until 7am when they saw the Chinese man coming out of Sunday Hotel and going to the subject car. The Chinese man entered the subject car and was detained before he could drive off. PW3 identified himself as a police officer and asked the Chinese man (identified as the accused) to open the door. PW3 carried out a body search on the accused

A but did not find anything incriminating. PW3 then examined the subject car. PW3 found a package wrapped in newspaper under the steering dashboard. The package was suspected to contain syabu. PW3 also found a hotel room key for room no. 201 on the accused. The accused was then brought to room 201 in Sunday Hotel using
B the hotel room key. Inside room no. 201 PW3 found a brown bag on the bed. Inside the brown bag PW3 found a package wrapped in transparent plastic inside which contained three transparent plastic packages containing substance suspected to be syabu. A receipt issued by Sunday Hotel to the accused was also found inside the
C bag.

[3] According to PW2's testimony, at 12 midnight on 9 March 2005 he was with PW3 in a car in Permas Jaya. PW3 informed him that he received information about a Chinese man trafficking drugs in Sunday Hotel. The Chinese man was using a silver colour
D Proton Waja no. WJA 9290. PW2 and PW3 then went to Sunday Hotel at 12.30am. PW2 did not see the subject car. At 1am PW2 saw the subject car passing by and stopping in front of Sunday Hotel. He saw a Chinese man exiting the subject car carrying a sling bag. The Chinese man went into Sunday Hotel. PW2
E remained at his position until the backup team arrived. At 2am PW2 left for Permas Jaya. PW2 did not identify the Chinese man in question.

[4] In court PW3 testified that at about 12 midnight on 9 March 2005 he was making his rounds with PW2. He received information
F about a Chinese man in a Proton Waja no. WJA 9290 carrying out drug trafficking activities at Jalan Bakawali 48, Taman Johor Jaya near Sunday Hotel. They proceeded to the location and arrived at about 12.30am. They carried out surveillance in the vicinity for about 45 minutes when they saw the subject car passing their car.
G PW3 saw the subject car parked along Jalan Bakawali 48 nearby Sunday Hotel. PW3 saw a Chinese man wearing a dark shirt with a sling bag come out of the car and entered Sunday Hotel. There was no one else in the subject car. PW3 also called for backup. They continued their surveillance until 1.30am. The backup team
H of six police personnel comprised of L/Kpl Tanzizi, Kpl Rahim, L/Kpl Rafi, Kpl Chew, Sgt. Nesa, L/Kpl Rozelezawati and Kpl Kamaruddin. PW3 organised his police party into two teams. Both teams were to keep a lookout of the subject car and the entrance to Sunday Hotel. Once PW3 had identified the suspect the two
I teams were to approach and hem in the subject car. They were to assist PW3 to carry out the examination. Both teams conducted their surveillance outside Sunday Hotel. The surveillance continued

until 7am. Throughout that period the Chinese man did not come out of Sunday Hotel and no one went near the subject car. After 7am PW3 saw the suspect coming out of Sunday Hotel walking towards the subject car. The suspect was wearing a dark shirt. He was not carrying anything. As soon as the suspect got into the subject car PW3 and his police party sprang into action and prevented the subject car from reversing out. PW3 then approached the subject car and identified himself to the suspect (identified as the accused). PW3 examined the accused's body and found some money, an identity card, RM100 cash, a hotel room key with tag no. 201. PW3 then examined the subject car. PW3 found a newspaper wrapped package (exh. P6A) in a compartment under the steering dashboard. PW3 opened the package in the presence of the accused. Inside the package PW3 found five clear plastic packets (exhs. P6A1-5) containing crystalline substance suspected to be syabu. The accused appeared to be frightened. PW3 then seized the exhibits and arrested the accused. After that PW3 together with Kpl Tanzizi, Kpl Chew and L/Kpl A Rahim escorted the accused to room 201 in Sunday Hotel. PW3 held on to the exhibits. PW3 opened the door to room 201 using the key found on the accused. PW3 then examined the room in the presence of the accused and the three police officers. There was no one in the room. PW3 found a brown sling bag (exh. P8B) on the bed. Inside the said bag PW3 found three clear plastic packets (exhs. P9A1-3) containing crystalline powdery substances suspected to be syabu and a receipt issued by Sunday Hotel in the name of the accused (exh. 9B). PW3 also seized all the said exhibits and brought the said exhibits and the accused back to his office. At his office PW3 drew up a search list (exh. P10B). PW3 then handed over the exhibits to Chief Inspector Chew Chee Lee, the investigating officer. In acknowledgement of the exhibits Chief Inspector Chew Chee Lee issued a Sijil Serah Menyerah (exh. P11) signed by both PW3 and Chief Inspector Chew.

[5] Kpl Mohd Tanzazi bin Ibrahim (PW5) testified that on 10 March 2005 at 1.30am he attended a briefing together with five other police officers in front of Sunday Hotel. PW5 noticed a Proton Waja no. WJA 9290 parked in front of Sunday Hotel. PW7 said that they kept a lookout of the subject car. During that time no one approached the subject car. However, at about 7am PW5 saw a Chinese man coming out of Sunday Hotel heading towards to the subject car. PW3 then gave the order to apprehend the suspect. At that time the suspect had already entered into the subject car. PW5 and his team managed to block the subject car. PW5 said that PW3 then identified himself to the suspect. The

A suspect looked frightened. PW3 then examined the suspect's body but did not find anything incriminating. PW3 then examined the subject car whilst PW5 and L/Kpl Rafi guarded the suspect. PW3 found a newspaper wrapped package (identified as P6) in fuse box compartment under the steering dashboard. PW3 opened the said B package. PW5 saw the contents inside the said package (identified as P6A). A hotel room key was also found (P8A identified). Then PW3, L/Kpl Rafi and PW5 escorted the suspect (identified as the accused) to the counter in Sunday Hotel and then to room number 201. The door to room 201 was locked. They entered using the C hotel room key. Inside the hotel room PW3 found a brown bag (P8B identified) on the bed. Inside the said bag was a plastic packet which contained three plastic packets containing substance suspected to be syabu. A hotel receipt was also found in the bag. There was no one in the room. They did not find anything else in the room. D

[6] ASP Chew Chee Lee (PW7) testified in court that on 10 March 2005 he received the exhibits from PW3 which are set out in the Sijil Serah Menyerah (P11). PW7 said that he kept the exhibits in a metal cabinet to which no other person had access. E The subject car was kept in the police station compound. The subject car was reported stolen on 4 March 2005. The subject car was returned to the owner one Timothy Leong Chee Kit on 30 March 2005. PW7 also said that he went to Sunday Hotel and confiscated the hotel room key no. 201 (exh. P8A) and obtained a F photocopy of the hotel Form of Register (exh. P22). According to P22 one Yee Cheong Seng stayed at the hotel on 9 March 2005 at 11.30pm in room 201 and left the room on 10 March 2005 at 7.15am. PW7 also tried to start the subject car using the keys (P7D) and found that it functioned. PW7 handed over the exhibits to Encik Mohammad Yazid, the chemist. The said exhibits were G returned to him by Encik Mohammad Yazid on 30 May 2005 together with a chemist report.

[7] Encik Muhammad Yazid bin Ibrahim (PW4) the chemist in his evidence testified that on 12 March 2005 he received the H exhibits from PW7 and issued acknowledgement receipts (exhs. P15 and P12) for the same. In respect of the exhibits listed in P12 he said that he carried out the two standard tests namely, the Gas Chromatography Mass Spectrophotometry (GCMS) examination and the Gas Chromatography (GC) examination on the crystalline I substances. He confirmed that the said crystalline substances contained in exh. P9 was Methamphetamine as defined in s. 2 DDA having a net weight of 6.58 grammes. He prepared a chemist

report for the said analysis exhibited marked P14. In respect of the exhibits in P15 PW4 also carried out the said two standard GCMS and GC examination on the crystalline substances. He confirmed that the said crystalline substances contained in exhibit P6 was Methamphetamine as defined in s. 2 DDA having a net weight of 191.65 grammes. PW4's chemist report for the said analysis was produced and marked exh. P17.

[8] Learned deputy submitted that there was clear possession on the part of the accused of the drugs found in the car and inside the hotel room. At the time when the accused was arrested, he was inside the car where the drugs were found under the steering dashboard. The key question is whether the accused was aware that he was driving the car withfive days before the accused was arrested. When PW3 identified himself to the accused the accused became frightened. The drugs were found wrapped in a newspaper in the fuse box compartment under the steering wheel. PW3's evidence is corroborated by PW5 who was at the scene. It was submitted that in the circumstances, the presence of the dangerous drugs in the car, without any plausible explanation from the accused would give rise to a very strong inference that at the material time the dangerous drugs were in the custody and control of the accused. Further the irresistible inference that can be drawn in the circumstances is that the accused all along knew about the drugs found in the car. The evidence also clearly shows that there was no other person with the accused when he first arrived at Sunday Hotel and until he left the hotel the following morning. There is no evidence whatsoever to support the defence's suggestion of a third person "Ah Chiang". None of the prosecution witnesses agreed or even have knowledge of the existence of such a person. There is also no evidence to show that this person actually exists.

Defence Submission

[9] Learned counsel for the accused submitted that the prosecution has failed to prove possession of the drugs found in the car. Firstly, the accused was arrested shortly after he entered into the car. There was nothing to indicate how long in all the accused had been in charge of the car. He was only seen briefly at the wheel. Secondly, there were no fingerprints of the accused found on the five plastic packets containing the drugs. No evidence was adduced as to whether the accused's hand or fingernail clippings were examined for traces of methamphetamine. Thirdly, the car did not belong to the accused. The owner of the car was not called as a witness. Learned counsel submitted that it is a mystery as to how

A the drugs got into the fuse box compartment of the car. There is no evidence that the police had seen the accused putting the drugs into the fuse box compartment. The drugs could have been put there by Timothy Leong before his car was stolen or maybe they were put in by the car thief. PW7 testified that he was informed by B Sjn Sabri b Ibrahim the investigating officer concerned that no arrest had been made in relation to that case. Fourthly, the drugs were not in plain view of the accused. The mere presence of the accused in proximity of the drugs does not constitute possession (*Chan Pean Leon v. PP* [1956] 1 LNS 17; *PP v. Lin Lian Chen* [1992] 4 CLJ C 2086; [1992] 1 CLJ (Rep) 285). PW3 testified that he cannot see the drugs before the fuse box compartment was opened. Even though the accused looked frightened, PW3 and PW5 never described how the accused was seen to react in such a way that they could have concluded that he was in 'ketakutan' (*PP v. Sim Keng Tee* [2008] 9 CLJ 755). D

[10] As to the drugs found in the hotel room, learned counsel submitted that there is no nexus between the accused and the drugs. The accused was arrested outside the hotel and brought into the hotel room. There were no fingerprints of the accused found on E the three plastic packets containing the drugs. No evidence was adduced as to whether the accused's hand or fingernail clippings were examined for traces of methamphetamine. There was no evidence to show that the accused had entered into the room. The prosecution witnesses only saw the accused enter the hotel. No F personal belongings of the accused were found in the room and in the bag. The hotel receipt (P9) was not found in the bag and the maker of P9 was not called to testify. There is also doubt as to how the hotel room key was found on the accused. According to the hotel register (P22) the accused left the hotel at 7.15am and the keys should have been returned. However, the accused was seen G by PW3 and PW5 at 7am. The maker of P22 was not called. PW8 testified that the hotel room spare key was kept by the hotel manager one Mr. Tan. Mr. Tan was not called to testify in court. There is no evidence to show that only the accused had access to the room in question (*Gooi Loo Seng v. PP* [1993] 3 CLJ 1; *PP v.* H *Tukiman Demin* [2008] 8 CLJ 856).

[11] Learned counsel also took issue with the s. 112 statement (ID 28) by Timothy Leong sought to be admitted under s. 32 of the Evidence Act 1950. It was contended that ID 28 should not be I admitted as evidence. There had been no sufficient effort made to trace the witness. There was no advertisement. Even the notice (P25) intended to be advertised contains a spelling error of the

witness' name. PW9 did not make any search at any telecommunication company even though the witness's mobile phone appears in his police report (P19). PW9 also did not send any police signals to every police district to trace the witness. Finally, attempts to trace the witness were made at the last minute. PW9 took the first step on 16 January 2009 after the commencement of the trial (*PP v. Morgan Ayavoo* [2004] 3 CLJ 623). Learned counsel submitted that for the foregoing reasons the prosecution has failed to prove a *prima facie* case against the accused and called for the accused to be acquitted and discharged without calling on him to enter his defence on both charges.

The Law

[12] In a charge under s. 39B(1)(a) DDA to which s. 2 also applied, the onus lies upon the prosecution to prove the following ingredients of the offence *viz*:

(1) that the accused had possession of the dangerous drugs in question;

(2) that the accused did traffic in the dangerous drugs in question.

[13] In proving the said ingredients the prosecution may elect to invoke the presumption of possession under s. 37(d) or the presumption of trafficking under s. 37(da). If the prosecution elects not to invoke the presumption of possession under s. 37(d), then it is incumbent upon the prosecution to adduce evidence so as to establish that the accused had possession of the dangerous drugs independent of the statutory presumption. If, on the other hand, the prosecution elects not to invoke the presumption of trafficking under s. 37(da) then it is incumbent upon the prosecution to adduce evidence that the accused was trafficking in the dangerous drugs within the meaning as defined in s. 2 DDA.

[14] What constitutes 'possession' under s. 37 is a question of law (see *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 at p. 349). In *Yee Ya Mang v. Public Prosecutor* [1971] 1 LNS 156 the appellant was charged under s. 9(1)(a) of the Arms Act 1960 for having in his possession a pistol and three rounds of ammunition, without an arms licence or an arms permit. The pistol and the three rounds of ammunition were not found in the house occupied by the appellant but at a spot in a rubber estate pointed out by the appellant. In the course of police investigations the appellant said that he had a revolver. Subsequently, he took the police officer to the spot where

A the revolver was found. The spot pointed out by the appellant was a pit, covered by pieces of wood, underneath which was found a plastic bag. Inside the plastic bag was a stocking containing the subject matter of the charge. About an hour earlier the appellant had taken the police to a different spot in another rubber estate B from which a toy pistol was recovered. Sharma J described 'possession' in the following manner:

> The word 'possession' implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion C and consciousness in the mind of the person having 'possession' that he not only has such dominion but also that he can exercise it. In the present case if, for example, the accused had gone alone to the spot in question and took out the loaded pistol from the place of concealment, the loaded pistol could be said to be in the possession of the accused as it lends support to the conclusion that it was within his exclusive D knowledge as to where this pistol was kept concealed in the rubber estate. There may, however, be cases where a court is not justified in presuming possession of the person who had mere knowledge of the articles concealed. A good deal depends upon whether the production was accompanied by information given by the accused in custody as would be admissible under section 27 of the Evidence Ordinance. E Such information can be relied on by the prosecution as incriminating evidence against the accused along with the production or discovery of the articles in question but the mere production of such articles by itself would not necessarily prove his possession. It would at the most show that he had knowledge where the articles were kept or concealed. Thus, when it is proved that the accused made a statement to the effect F "I have concealed the articles at a particular place and I will produce them" and if those articles are discovered in consequence of that statement, that would be evidence of his possession even though those articles were kept or concealed in another man's property, because unless he had possession he would not have kept them at that place. G When, however, the accused without stating that he had concealed those articles merely produces them from a place to which other people could have access, it would not be sufficient to establish his possession even though the articles may be found carefully concealed and hidden because that is quite consistent with any person having done so and the accused might merely have knowledge of it. In the absence of any H incriminating statement made by the accused leading to the discovery of the articles, their production alone from another man's land cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there.

I This principle was also discussed at length by Lim Beng Choon J in the case of *Public Prosecutor v. Badrulsham bin Baharom* [1987] 1 LNS 72:

I believe it is well settled at least by our courts that to establish possession by an accused person of any dangerous drugs or to impute to him possession of the said drugs it must first be shown that he had knowledge of the drugs which were found to be in his possession. The earliest authority, which I could find, that expounded this principle is the case of *Chiah Tian v. Rex* where the then Chief Justice of Singapore said at p. 106:

> In my opinion, possession to be an offence must be possession under such circumstances that a court is justified in finding that the accused (or the servant in cases of constructive possession) was conscious of the possession. As Pollock CB put it in *The Queen v. Woodrow* 16 LJMC 122, 'a man can hardly be said to be in possession of anything without knowing it' and I think that a person is not guilty of the offence of possession if he is not aware of the possession. (emphasis added)

This principle was expounded with great clarity in the case of *Leow Ngee Lim v. Regina* at p. 31:

> In some of the cases it has been said that without knowledge there can be no possession. In others, 'in possession' has been read as 'knowingly in possession' by application of the doctrine of *mens rea*. In some instances either view leads to the same result but not in all. The *dicta* does not make what degree of knowledge is meant. Also in some of the statues, 'possession' and 'knowledge' have been treated separately and much confusion has resulted.
>
> The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. (emphasis added)

Then in *Saad bin Ibrahim v. Public Prosecutor* Yong J was quite emphatic as to the requirement of the element of knowledge on the part of the possessor before he could be criminally incriminated with possession of a prohibited article. Thus his Lordship said at p. 159:

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these

A characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

The principle of possession with *mens rea* has been steadfastly adhered to by our courts in construing the word possession as used in section B 37(d) of the Act. Although there can hardly be any dispute that the existence of this element of knowledge is necessary to establish possession the difficulties lie in applying this principle to the facts of each individual case bearing in mind that notwithstanding the shifting of the burden of rebutting possession of the dangerous drugs to the accused upon the successful invocation of the presumption under C s. 37(d) of the Act, all that is required of the accused to rebut the presumption is for him to show upon a balance of probabilities that he was not aware of the dangerous drugs which were said to be under his possession. Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, D certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions.

E **[15]** In relation to drugs found in a vehicle Shankar J (as he then was) in *PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557, after considering a number of authorities, stated:

... those cases do not decide that in all cases a person who is in sole F charge of a vehicle cannot be found to be in possession of articles being carried in it. As Thomson J himself said in *Tong Peng Hong v. PP* [1955] 21 MLJ 232 at p. 233:

> If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely G reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it ..

And at p 234:

I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or H explanation lead the court to that conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle.

[16] As mere custody and control is insufficient to establish I possession for the purpose of the DDA, knowledge of such drug by the accused must be established. However, whether or not in a given case a person can be said be in possession of something is a

question of fact. In *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and he observed:

> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, page 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but is frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set exhaustively and it is impossible to lay down any general rule on this point. But there must something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

And further down on the same page he added:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

That knowledge cannot be proved by direct evidence was also reiterated in the judgment of the Privy Council in *Ong Ah Chuan v. Public Prosecutor* [1980] 1 LNS 181:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity larger than is likely to be needed for his own consumption the inference that he was trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as contained in section 15 of the Drugs Act. (emphasis added)

And further down in the same page:

> Whether the quantities involved is large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

[17] The question of knowledge necessary to establish possession was enunciated by the Federal Court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 where three packages containing cannabis were recovered from under the driver's and the front passenger's seats in a car driven by the accused. At p 349 Arifin Zakaria FCJ (now CJ Malaya) speaking for the Federal Court said:

> Therefore, the presence of the 3 packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature. (see also *Lim Beng Soon v. Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v. PP* [2001] 1 SLR 633, at p. 639:
>
> > 21. For the element of 'possession' (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v. Metropolitan Police*

Commissioner [1969] 1 AC 256; *Tan Ah Tee & Anor v. PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlars could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How J remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at p. 438):

> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (emphasis added)

In *Ramis a/l Muinandy v. Public Prosecutor* [2001] 3 SLR 534, the Singapore Court of Appeal again propounded on the question of knowledge necessary to establish possession and at p. 541 states:

> Knowledge of drugs
>
> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

In *Tan Ah Tee (supra)*, Wee Chong Jin CJ, delivering the judgment of the court said ([1978-1979] SLR 211 at 217-218; [1980] 1 MLJ 49 at pg. 52):

> Even if there is no statutory presumption available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the

physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v. PP (supra)*. In Warner the following question was posed to their Lordships:

> Whether for the purpose of section 1 of the Drugs (Prevention of Misuse) Act, 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.

At p. 367 Lord Reid addressed the issue as follows:

> The object of this legislation is to penalise possession of certain drugs. So if *mens rea* has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

In the same case Lord Morris answered the question in the following manner:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would be no possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession

> of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[18] More recently the Federal Court in the case of *PP v. Denish Madhavan* [2009] 2 CLJ 209 considered the propriety of treating possession of an article in criminal law as exclusive possession. It is also instructive to reproduce what Abdul Aziz bin Mohamad FCJ said at paragraph nos. 16-19:

> 16. Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, – that is, "exclusive" – that a conviction is possible. When the learned trial judge said "The accused sought to negative the proof of exclusive possession ...". we must take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.
>
> 17. The idea of exclusivity features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v. Reg.* [1965] 22 MLJ 28:
>
> > ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
> >
> > Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

A 18. Thomson J, in *Chan Pean Leon v. Public Prosecutor* [1956] 22 MLJ 237, said that "possession" for the purposes of criminal law involves possession itself – which some authorities term "custody" or "control" – knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Edition, p. 304), in which the exclusive element mentioned by Taylor J appears:-

B

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

C

19. Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

D **[19]** At the close of the prosecution's case, it is the duty of the court to consider whether the prosecution has made out a *prima facie* case against the accused. In this respect, s. 180 of the Criminal Procedure Code ('CPC') provides as follows:

Section 180

E

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that a *prima facie* case has not been made out against the accused, the Court shall record an order of acquittal.

F

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

G **[20]** What is the standard of proof on the prosecution at the close of its case? Subsection (1) of s. 180 makes it clear that the standard of proof is on the prosecution to make out a *prima facie* case. Subsection (2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out. On the other hand, if a *prima facie* case has been made out then subsection (3) provides that the accused shall be called upon to enter on his defence. Thus, whether or not the accused is acquitted or called upon to enter on his defence at the close of the prosecution case turns on the meaning of the phrase '*prima facie* case'.

H

I

[21] In *Balachandran v. PP* [2005] 1 CLJ 85 the Federal Court when called upon to consider the standard of proof on the prosecution at the close of the case for the prosecution has this to say at p 99:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whitley's Law Dictionary*, 11th edn as:
>
> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

And continuing at p. 100:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no *prima facie* case.

[22] In order to determine whether the elements of the offence have been established, the court must undertake a positive evaluation of the credibility and reliability of all the evidence adduced. In this regard the court must undertake a maximum evaluation of the prosecution evidence. In *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457 the Federal Court has this to say at p 465:

> After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended section is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum

A evaluation of the prosecution evidence when deciding whether to call on the accused to enter on his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court B to draw the inference that is favourable to the accused. See, *Tai Chai Keh v. PP* [1948-49] MLJ Supp 105; *PP v. Kassim b Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a C maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a D reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case, one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him E on the evidence now before me? See, *Dato Mokhtar b Hashim & Anor v. PP* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted. (emphasis added)

F **[23]** The steps that should be taken by this court at the close of the prosecution's case may be summarised as follows:

1. At the close of the prosecution's case, subject the evidence led by the prosecution in its totality to maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's G witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

H 2. Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" I then, a *prima facie* case has not been made out and the accused should be acquitted;

3. After the defence is called, the accused elects to remain silent, then convict;

4. After the defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 263.

[24] In the circumstances aforesaid did the accused have possession of the dangerous drugs? Before the accused can be criminally incriminated with possession of the dangerous drugs the requirement of knowledge on the part of the accused must be satisfied. The accused must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it *(Saad Ibrahim v PP, supra)*. Knowledge is an element of the state of the mind of a person. To establish possession the element of knowledge must be judged from his outward acts or omissions. Knowledge cannot be proved by direct evidence. It can only be inferred from the surrounding circumstances. The purpose with which he did an act is a matter of inference from what he did. In short, it is for the court to draw an inference from all the facts and circumstances of this case, giving due weight to the credibility of the witnesses *(PP v. Abdul Rahman Akif, supra)*.

Findings Of The Court

[25] In this case the accused came under surveillance on the morning of 10 March 2005 when he parked his car in front of Sunday Hotel. PW2 and PW3 saw the accused alighting from the car and entered the Sunday Hotel through the main entrance at about 1am. The accused was seen carrying a sling bag. From the moment that the accused alighted from the car up to the moment he returned to the car the car remained under surveillance. There was no other person in the car and no one was seen going near to the car. At about 7am the accused was seen coming out of the hotel entrance and getting into the car by PW3 and PW5. Before the accused could drive off his car was suddenly hemmed in and a team of police officers approached the car. PW3 then identified himself to the accused. A body search on the accused after he came out of the car did not find anything incriminating. However, when PW3 then examined the car, PW3 found a newspaper wrapped package (P6A) hidden in the fuse box compartment under the steering dashboard. Inside P6A PW3 found 5 small plastic packets (exhs. P6A1-5) containing crystalline substance suspected to be syabu. According to PW3 and PW5 the accused appeared to be in a state of shock. The accused was then arrested and handcuffed. PW3 and his men then brought the accused to room 201. The room was locked and using the hotel room key found on the

A accused, PW3 opened the door. There was no one in the room. Inside the hotel room PW3 found a sling bag (P8B) on the bed. Upon examination, PW3 found a hotel receipt and 3 plastic packets (P9A1-3) inside the sling bag containing substances suspected to be dangerous drugs. The starting point in the consideration of this
B issue is this – the drugs was already in the accused's car when he entered the vicinity. The accused was the only person in the car. No one went near the car. The drugs was found hidden in the fuse box compartment under the steering dashboard. The accused looked frightened when the discovery was made by PW3. In this instance
C the presence of the package in the car in the absence of any reasonable explanation from the accused would give rise to a strong inference that the accused knew that the package in the car contained drugs or things of a similar nature. The fact that the drugs were wrapped in newspaper and concealed in the fuse box compartment is no ground for saying that an inference could not be
D drawn against the accused that he had the requisite knowledge.

[26] En. Muhammad Yazid bin Ibrahim a chemist PW4 had testified that he had thoroughly examined and analysed the exhibits in P12 and P15. He said that the exhibits were submitted to him
E by PW7 and issued acknowledgement receipts (exhs. P15 and P12) for the same. He conducted the two standard tests namely, the Gas Chromatography Mass Spectrophotometry (GCMS) examination and the Gas Chromatography (GC) examination on the crystalline substances. He confirmed that the said crystalline substances
F contained in exh. P9 was Methamphetamine as defined in s. 2 DDA having a net weight of 6.58 grammes. He prepared a chemist report for the said analysis exhibited marked P14. In respect of the exhibits in P15 PW4 also carried out the two standard GCMS and GC examination on the crystalline substances. He confirmed that
G the said crystalline substances contained in exh. P6 was Methamphetamine as defined in s. 2 DDA having a net weight of 191.65 grammes. PW4's chemist report for the said analysis was produced and marked exh. P17. PW4 has been a chemist with the Chemistry Department for more than 14 years. He holds a B. Sc degree majoring in chemistry and had given expert evidence in court
H on more than 50 occasions. His expert evidence had been accepted in other drugs cases. The court accepts his findings with regard to the technique of identification and methodology of analysis of the dangerous drugs. The court is satisfied with the manner in which the analysis was conducted by PW4. There is no other evidence to
I challenge or contradict PW4's findings. Accordingly, the court accepts PW4's findings as true and accurate.

[27] The amount of the dangerous drugs involved is 191.65 grammes of Methamphetamine which is almost 4 times the amount necessary to raise the presumption of trafficking under s. 37(da) DDA. The necessary implication is that the drugs were not for personal consumption. In view of s. 37(da) DDA the accused shall be presumed, until the contrary is proved, to be trafficking in the said dangerous drugs. Accordingly, the court finds that the prosecution has made out a *prima facie* case of actual possession against the accused. The court called upon the accused to enter on his defence.

Case For The Defence

[28] The accused elected to testify on oath. He said that on 10 March 2005 at about 1am he arrived at the Sunday Hotel with a friend in a Proton Waja. His friend by the name of Ah Chiang/ Ah Keong drove the car. Ah Chiang had earlier picked him up at the Larkin bus station when he arrived from Kuala Lumpur by bus. The accused also said that he had come to Johore Bahru for the purpose of looking for a prostitute. He and Ah Chiang checked in the hotel. He used his name because Ah Chiang had requested him to do so. Both he and Ah Chiang stayed in room 201. They did not find any prostitutes for the night. The accused and Ah Chiang then went out for a meal. After they returned to the room the accused went to bed. On 10 March 2005 at 7am the accused woke up to find that his friend Ah Chiang was not in the room. He tried to contact him through his handphone but to no avail. The accused then saw the car keys on the table and decided to take the car to have breakfast. When he opened the door of the car and sat on the driver's seat he saw a car stopping behind his car. Then he saw two Malay men alighting from the car and directing a pistol in his direction. They asked the accused to open the door. The accused opened the door and came out of the car and was immediately beaten up and handcuffed. He was then ordered to squat beside his car. His car was then examined. A Malay man brought out a package from the car and asked him about it. The accused said that he did not know about the thing. The accused said that he had not seen the package before. The car belonged to his friend Ah Chiang. The hotel room key was also recovered from the car. Then the accused was taken to the hotel room no. 201. Inside the room the men showed him a number of packages to which the accused said he did not know. He did not know where they got the packages from. He did not know what was inside the packages recovered in the room and in the car. Under cross-

examination the accused agreed that his defence would be supported by Ah Chiang's evidence. He said that he knew Ah Chiang in Johor. Ah Chiang stayed in Taman Molek. He has visited Ah Chiang's house. Ah Chiang is a fish breeder.

[29] Learned counsel for the defence submitted that the defence will have to prove its case on a balance of probabilities so as to cast a reasonable doubt on the prosecution case. It was submitted that Ah Chiang did exist. Ah Chiang was mentioned in the accused's cautioned statement. The early disclosure of this defence would operate in favour of the accused and lend credence to his claim of innocence. The accused had given a clear description of Ah Chiang, where he lives, what he did for a living and when they became friends. The defence had also suggested the name of Ah Chiang to the prosecution's witnesses. All these show that the existence of Ah Chiang is probable and not an afterthought (*PP v. Iskandar Mohamad Yusof* [2006] 6 CLJ 379).

[30] Learned counsel also submitted that there is no issue of whether the accused's version was truthful or not. The issue is whether the accused has established his case on a required degree of proof to cast a reasonable doubt on the prosecution case. To earn an acquittal, the court may not be convinced of the truth of the defence story. Raising a reasonable doubt in the guilt of the accused will suffice. There was a strong inference that the drugs in question belonged to Ah Chiang being the driver and the person who carried the brown bag *(Mohamad Radhi Yaakob, supra)*.

[31] Learned counsel further contended that the accused had no knowledge of the drugs because (i) he testified that he had no knowledge of the drugs; (ii) there was no evidence that he had put the drugs into the car or the brown bag; (iii) there were no fingerprints of the accused found on the five and three plastic packets containing the drugs; (iv) there was no evidence adduced as to whether the accused's hand or fingernail clippings were examined for traces of methamphetamine; (v) the accused was not the owner of the car, the owner was not called to testify; (vi) no personal belongings of the accused was found in the car or the brown bag; and (vii) the drugs in question were methamphetamine where one who is not familiar with this type of drug would not know the substances are methamphetamine or other substances of similar appearance. There was no factual matrix to infer that the accused had knowledge of the nature of the drugs in question. The evidence was that the drugs were in newspaper wrapped package and the

accused would not be able to see through the newspaper wrapping (*PP v. Tan Tatt Eek* [2005] 4 CLJ 460). Learned counsel also argued that in the circumstances there is more than one inference pertaining to the possession of the drugs. The car belonged to one Timothy Leong Chee Kit. The owner has lodged a police report that the car was missing. Both the owner and the police officer investigating that report was not called to testify. The fact that there was an involvement of Ah Chiang being the driver of the car gives rise to the inference that he placed the drugs in the car. As more than one inference can be drawn the one most favourable to the accused must be adopted.

[32] In reply learned deputy submitted that the accused failed to produce any evidence relating to the existence of Ah Chiang. He did not call any of the witnesses offered to the defence by the prosecution to testify on the existence of Ah Chiang. The evidence of SP2 and SP3 clearly shows that the accused was the only person seen coming out of the car and entering the hotel. The accused was also seen alone by SP3 on the morning of 10 March 2005 coming out of the hotel walking towards the car. SP3's evidence was supported by SP5. Furthermore, the hotel receipt (P9B) in the accused's name shows that the room was registered under his name and not Ah Chiang. Therefore the accused's contention about Ah Chiang is a fabrication and cannot be accepted. The accused's version is a plain lie and cannot be believed. The accused's denial of the drugs in the car and in the hotel room are not supported by evidence. Therefore the defence is one of mere denial and cannot raise any doubt on the prosecution's case (*PP v. Lee Ah Ha* [1988] 1 LNS 193; *D.A. Duncan v. PP* [1980] 1 LNS 12 FC; *PP v. Ling Tee Huah* [1980] 1 LNS 212; *PP v. Nur Hassan Salip Hashim & Anor* [1993] 2 CLJ 551). The defence is a more afterthought because the accused's contention of looking for prostitute was not raised during the prosecution's case (*Chua Beow Huat v. PP* [1968] 1 LNS 24).

Findings Of The Court

[33] The burden of rebutting the presumption under s. 37(d) is on the accused. In this regard the standard of the evidential burden upon the accused to rebut the statutory presumption has been succinctly explained by the Privy Council in *Public Prosecutor v. Yuvaraj* [1968] 1 LNS 116. Before the Privy Council the following question which concerned the phrase 'unless the contrary is proved' contained in s. 14 of the Prevention of Corruption Act 1961 was posed:

A Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of
B which is so probable that a prudent man would act on the supposition that it exits. (section 3 Evidence Ordinance).

Lord Diplock delivering the judgment of the Board said:

The test is the same as that applied in civil proceedings: the balance of
C probabilities. This was the test which was approved by the Court of Criminal Appeal in *R. v. Carr-Briant* a case upon a provision in an English statute in similar terms to that contained in section 14 of the Malaysia Prevention of Corruption Act 1961.

[34] This evidential burden on the part of the accused to rebut
D statutory presumption on a balance of probabilities is heavier than the burden of casting a reasonable doubt but is lighter than the burden of the prosecution to prove beyond reasonable doubt. (see *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 and *PP v. Ku Yahya Ku Bahari & Anor*
E [2000] 3 CLJ 162). Accordingly, if the court should on a balance of probabilities find that the accused's version is compatible with his innocence he should be given the benefit of the doubt and be acquitted of the offence with which he is charged.

[35] It is also pertinent to note what Suffian J (as he then was)
F enunciated in *Mat v. PP*, *supra* on the burden of proof by the accused in rebutting the prosecution case against him. If the trial judge accepts the explanation given by or on behalf of the accused, the trial judge must acquit. However, this does not entitle the trial judge to convict if the trial judge does not believe that explanation.
G The accused is still entitled to an acquittal if it raises in trial judge's mind a reasonable doubt as to his guilt. The burden of proving his guilt lies throughout on the prosecution. If upon the whole evidence the trial judge is left in a real state of doubt then the prosecution has failed to discharge the burden of proof. Thus,
H where the law casts the onus of giving an explanation upon an accused and the explanation is given, which if consistent with his innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth.

I

[36] The main crux of the defence is that the accused's friend one Ah Chiang picked him up at the Larkin bus station and drove him to the Sunday Hotel where they both stayed the night. When the accused woke up Ah Chiang was nowhere to be seen and he could not be contacted. Did Ah Chiang exist? In the first place the accused was seen arriving at Sunday Hotel in the car alone. He was seen coming out of the car carrying a sling bag entering the hotel. He checked into the hotel under his name. He was seen coming out of the hotel and going to his car. He was apprehended by the police personnel before he could drive away. The evidence of SP2 and SP3 clearly places the accused at the time when the accused arrived alone in the car and entered Sunday Hotel. The hotel receipt for the deposit paid by the accused is also in the name of the accused. The evidence of SP3 and SP5 shows that at about 7am the accused was seen coming out of Sunday Hotel alone. He walked alone to the car. He was alone inside in the car when the police personnel apprehended him.

[37] On this issue the evidence of SP2, SP3 and SP5 in this regard were clear and consistent. Their testimonies were unshaken in cross-examination. The accused's contention that he registered the room under his name at Ah Chiang's request is unlikely as the receipt was issued in his name. Furthermore SP3 only found one item was found in the hotel room. The one and single item was the sling bag containing the drugs the subject of the first charge. There was nothing in the room to indicate that there was any other occupant apart from the accused. There was nothing whatsoever in the room linking Ah Chiang. Further more there was nothing in the car to link Ah Chiang. SP3 only found the drugs concealed under the steering dashboard. The accused's contention is devoid of any plausible ground. The allusion to Ah Chiang is a mere fabrication which is totally unsupported. It is only a bare denial. It is a desperate attempt by the accused to shift the blame on to another person who did not exist.

[38] For the foregoing reasons the court is wholly convinced that at the material time and place, the accused knew that he was carrying the drugs in the car. He also knew that he had the drugs in the sling bag which he carried with him to the hotel room. Taking together, the totality of the evidence the surrounding circumstances and the conduct of the accused all point irresistibly to the accused having knowledge of the offending exhibits at the material time.

[39] In conclusion, after scrutinising and evaluating the evidence in its entirety, the court finds that the evidence leaves no questions unanswered. For this reason the court finds that the accused has not raised any reasonable doubt on the prosecution case. The accused has also failed on a balance of probabilities to rebut the presumption of trafficking under s. 37(da) DDA. The court therefore finds that the prosecution has proven its case against the accused beyond reasonable doubt for the offences with which he is charged. The accused is hereby found guilty as charged and convicted on it.

On the 1st charge the court imposes a term of imprisonment of two years and whipping of three strokes of the rattan.

On the 2nd charge the court imposes the only sentence permitted by law. That sentence is the mandatory sentence of death – that the accused is to be hanged by the neck until he is dead.